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Supreme Court, U.S.
FILED
JAN 13 2003
OFFICE OF THE CLERK

No. 02-830

IN THE

Supreme Court of the United States

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONER'S REPLY BRIEF

This brief is submitted by petitioner Brotherhood of Maintenance of Way Employes ("BMWE") in reply to respondents' ("Carriers") brief in opposition to BMWE's petition for a writ of certiorari for review of the decision of the United States Court of Appeals for the Fifth Circuit in *Burlington Northern and Santa Fe Railway Company, et al. v. Brotherhood of Maintenance of Way Employes*, 286 F. 3d 803(5th Cir. 2002)

I. RESPONDENTS HAVE NOT REFUTED BMWE'S SHOWING THAT THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH PRECEDENT OF THIS COURT REGARDING THE SCOPE OF SECTION 2 FIRST

The Carriers have argued that the Fifth Circuit's decision does not conflict with decisions of this Court, and that the Fifth Circuit did not effectively amend the RLA by judicial

fiat. Opposition at 4-10. However, BMWE demonstrated that there is a direct conflict between the decision below and the Court's decisions in *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987) ("*BN v. BMWE*") and *Chicago & North Western Transp. Co. v. United Transportation Union*, 402 U.S. 570 (1971) ("*CNW v. UTU*"). The Carriers' attempts to deny the conflict are unavailing. The courts below apparently viewed BMWE's actions as contrary to the spirit of the RLA because they found that BMWE had engaged in a number of strikes in violation of RLA Section 3, 45 U.S.C. §153. But this Court has consistently rejected efforts to use Section 2 First as a catch-all regulator of conduct of carriers and unions that is not regulated in other sections of the statute.

The Carriers assert that *BN v. BMWE* is distinguishable on its facts because there the union had engaged in secondary picketing, and the parties had exhausted RLA dispute resolution processes. Opposition at 6. But, by selectively focusing on the specific facts of that case, the carriers have ignored the Court's holding regarding the scope of Section 2 First and the explanation of its reasoning. The Court's rejection of the carriers' Section 2 First claim in that case was not because of the nature of the union's conduct, or the parties' completion of bargaining. Rather, the Court considered and expressly rejected the carriers' expansive interpretation of Section 2 First based on its "general language" regarding the duty "to attempt to settle disputes", and its stated goal of avoiding "interruptions of interstate commerce". 481 U.S. at 450, citations omitted. In doing so, the Court reviewed the language of Section 2 First and prior decisions regarding that provision, as well as precedent regarding the ability of courts to enforce the RLA generally, and Section 2 First in particular. In describing the limited scope of Section 2 First, the Court in *BN v. BMWE* cited both *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.* 353 U.S. 30 (1957) ("*Chicago River*") and *Chicago & North Western*

Transp. Co. v. United Transportation Union, 402 U.S. 570 (1971) ("*CNW v. UTU*"). It explained that a party has a cause of action under the RLA only when there is "express language" creating an "explicit obligation" involving a "'basic command' of the RLA". 481 U.S. at 451 n. 15. The Court held that there is no cause of action when it is asked not only to infer that a statutory duty may be enforced, "but also that such a duty exists". *Id.* The Court then concluded that "[t]he language of §2 First does not contain, however, either an express prohibition of secondary activity or suggestion that the scope of self -help is limited". *Id.*

While the instant case did not involve secondary activity after dispute resolution processes are exhausted, the Fifth Circuit's decision is squarely at odds with this Court's interpretation of Section 2 First and holding in *BN v. BMWE* which prescribed a limited scope of Section 2 First and a limited role for the courts with respect to that provision. Just as Section 2 First contains no express prohibition against secondary activity or an express limitation on the use of self help after bargaining is completed, Section 2 First contains no express prohibition against strikes without advance notice. As in *BN v. BMWE*, in this case, the Carriers again asked the courts to do more than find that an actual duty may be enforced; and the courts below did not just enforce an express command, they also inferred that a duty exists. While *BN v. BMWE* may be distinguishable from this case on its facts, the legal basis for the decision below clearly relies on the same expansive interpretation of Section 2 First based on its general language and goal that was conclusively rejected by this Court in *BN v. BMWE*. Accordingly, there is indeed a conflict between the two decisions.

The Carriers also argue that the decision below is actually consistent with this Court's decision in *CNW v. UTU*. Opposition at 5-6. BMWE respectfully submits that the Carriers have read the *CNW v. UTU* decision in a manner that is at odds with the Court's actual holding.

CNW v. UTU was a carefully balanced and limited 5-4 decision. The Court held only that Section 2 First is not merely hortatory (*id.* at 576), and that bad faith bargaining is so contrary to the express mandate of Section 2 First that parties exert every reasonable effort to make and maintain agreements and settle disputes, that bad faith bargaining would give rise to an action under that provision. *Id.* at 579.[1] But, after that reaching that conclusion, the Court specifically expressed its concern that judicial enforcement of Section 2 First might distort the bargaining process and reduce incentives to compromise, and that "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place". *Id.* at 583. The Court then stated that "[t]hese weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of Section 2 First". 402 U.S. at 583, citations and footnote omitted. BMWE respectfully submits that the Fifth Circuit's expansive reading of Section 2 First is not supported by *CNW v. UTU*; rather it is actually at odds with the Court's limited reading of that provision and its caution that judicial restraint is required in interpretation and application of Section 2 First.

In support of the Fifth Circuit's expansion of the duty imposed by Section 2 First, the Carriers rely heavily on the Court's remark in *CNW v. UTU* that the duty was "enforceable by whatever means appropriate on a case-by-case basis". Opposition at 5-6, *citing CNW v. UTU*, 402 U.S. at 577. But, the Carriers ignore the context of that statement and further ignore the express limitations on the Court's holding at the

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[1] *See also id.* at 574—"the narrow questions presented to us are whether §2 First imposes a legal obligation on carriers and employees or is a mere exhortation; whether the obligation is enforceable by the judiciary and whether the Norris-LaGuardia Act strips the courts of jurisdiction to enforce the obligation by strike injunction".

end of the decision. The Court made that statement in response to the appellate court's holding that Section 2 First was not enforceable in any circumstance, and after a review of the history of the RLA and prior RLA precedent regarding the limited role of the courts under the Act. *Id.* at 574-577. The Court observed that the carrier and union representatives who negotiated the statute had not listed specific violations and penalties in Section 2 First, but nonetheless intended that its mandate that the parties exert every reasonable effort to make and maintain agreements and settle disputes would be enforceable by the courts, but through case by case adjudication. 402 U.S. at 576, 577. The point of that discussion was to show that Section 2 First is not without effect, and that it does at least create the binding obligation to bargain in good faith which could be enforced.

The *CNW v. UTU* Court did not hold that the Courts have license to fill-in perceived gaps in the RLA by proscribing any conduct they deem to be inconsistent with the goals of the statute. Moreover, any question in this regard was resolved by the subsequent decision in *BN v. BMWE* in which the Court described the limited reach of the holding in *CNW v. UTU*. The *BN v. BMWE* Court noted that although the *CNW v. UTU* decision found that the "express language of Section 2 First creates a duty to 'exert every reasonable effort' to settle disputes", it only inferred that the duty was legally enforceable; whereas, in *BN v. BMWE* no "'basic command' of the RLA" could be said to have been violated; and the Court was being asked to not only infer that a statutory duty was so crucial that it was enforceable by injunction, "*but also that such a duty exists*". *Id.*, emphasis added.

It is therefore clear that when *CNW v. UTU* is read together with *BN v. BMWE*, the precedent of this Court rejects the notion that Section 2 First can be violated when a union does not give advance notice of strikes. As in *BN v. BMWE*, there is no such statutory command in Section 2 First. And, as in *BN v. BMWE*, the general language and statement of purpose

of Section 2 First is not sufficient to create the sort of new prohibition created by the Fifth Circuit; because in this case, like *BN v. BMWE*, one would have to infer not only an ability to enforce a purported duty, but also that a duty exists.

It is also clear that the courts below did effectively amend the RLA by requiring BMWE to give advance notice of strikes in future disputes. The Carriers asserted that BMWE had repeatedly violated RLA Section 3, by striking over disputes that were required to be arbitrated under that provision. Although Section 3 was effective in permitting quick injunctions to end those strikes, the Carriers looked to expand the duty imposed by Section 2 First to provide a basis for an injunction to prevent future strikes in violation of Section 3. The courts granted the injunction because they thought it appropriate to restrain conduct that they viewed as contrary to the spirit of the RLA and the expressed goal of Section 2 First. But this Court has consistently rejected that sort of expansive reading of Section 2 First and activist role for the courts under the RLA.

II. RESPONDENTS HAVE NOT REFUTED BMWE'S SHOWING THAT IF THE DECISION BELOW IS ALLOWED TO STAND, IT WILL HAVE A RADICAL IMPACT ON APPLICATION OF THE RLA

The Carriers contend that the Court should not review the decision below because it concerns only the particular conduct of one union, and because they claim that it does not involve an interpretation of the statute that will have wide-ranging implications. Opposition at 9-12. However, the Fifth Circuit's decision, and the reasoning on which its holding was based, cannot be restricted to this one case and this one union. If the decision is allowed to stand, both carrier and union conduct that has not previously been regulated will become subject to judicial oversight.

The Carrier's have restated the "Question Presented" here as whether Section 2 First may require a union to give advance notice of strikes ". . . when the union has a unique, admitted long-standing, and ongoing practice of engaging in surprise strikes, notwithstanding the fact that such strikes have repeatedly and invariably been deemed illegal under the RLA". As the Carriers have described the issue, the injunction does not depend on a specific and express duty under Section 2 First, but on who BMWE is, and what it has done in past litigated cases, rather than what the parties' legal duties are under Section 2 First as defined by precedent of this Court. The Court of Appeals was also concerned with what BMWE had done in past disputes, as opposed to the actual requirements of Section 2 First. The Fifth Circuit stated that "[w]e need not, and do not address the question whether the RLA forbids *all* surprise strikes"; only that "the statute forbids an ongoing, repeated practice of surprise strikes that are doomed later to be held illegal and enjoined". App. B. at 9a.

The Carriers and the court below have confused the issue of whether there has been a violation of law with the issue of what remedy is appropriate when the law has been repeatedly violated. If there actually was an RLA prohibition against strikes without advance notice, prior conduct would be irrelevant to a finding that there was an unlawful action; although it could be relied on as supporting a prospective advance notice injunction in a particular case. But, while repetition of unlawful behavior may be an appropriate consideration in formulation of a remedy when there is a violation of law, repetition itself does not make behavior unlawful. Either the language of Section 2 First imposes a duty on unions to give advance notice of strikes, or it does not. If two unions strike without notice over the same carrier action, it cannot be that one union's action is unlawful because it has struck without notice before, whereas the same action by the other union is not unlawful because it has not previously struck without

notice. Moreover, the Fifth Circuit's holding that there was a violation of Section 2 First based on behavior that may not be unlawful in isolation, but was unlawful because it was repeated, will certainly have precedential effect on future Section 2 First cases and future cases under other provisions of the RLA.

The broad implications of the Fifth Circuit's decision are illustrated by consideration of an analogous situation involving carrier actions in response to employee organizing efforts. RLA Section 2 Fourth (45 U.S.C. §152 Fourth) prohibits interference with employee self-organization and mutual assistance. The determination of whether a carrier's response to a new organizing effort violates Section 2 Fourth has never depended on whether the carrier has responded in the same manner to prior campaigns. But, under the Fifth Circuit's reasoning, if two carriers respond similarly to employee organizing, one could be found in violation of Section 2 Fourth because of prior similar conduct, whereas the other carrier could be found to have acted within the law because it had not previously engaged in the same conduct. Such a result would be to judicially amend Section 2 Fourth by converting otherwise unregulated conduct into unlawful conduct based on the frequency of its occurrence, just as the Fifth Circuit has done with respect to Section 2 First in this case.

The Carriers' have also failed to refute BMWE's showing that the Fifth Circuit's decision will affect various types of union and carrier actions that have not been held to violate the RLA. Petition at 19-21. The Fifth Circuit derived the advance notice obligation from an expansive application of Section 2 First's language regarding the duty to exert every reasonable effort to make and maintain agreements and settle disputes. The very breadth of the words used in Section 2 First means that, if they are to be read and applied expansively, they will necessarily cover a broad range of union and carrier actions not previously subject to judicial regulation.

The language of Section 2 First requires "every" effort that is "reasonable"; and that effort applies to both the making and maintaining of agreements and to settlement of all disputes. If that language is read and applied expansively, it necessarily would apply to all sorts of conduct that would impede, or even merely fail to advance, the making and maintaining of agreements or settlement of disputes. The general nature of the words used in Section 2 First is the reason why this Court has carefully limited its application.

In *CNW v. UTU*, this Court recognized that the language of Section 2 First was vague and facially very general, and that judicial involvement in disputes under Section 2 First could have a wide-ranging, and unintended adverse impact on rail and airline industry labor relations. *See* 402 U.S. at 583, noting that judicial enforcement of Section 2 First might distort dealings between carriers and their employees; and counseling restraint in the issuance of injunctions based on violations of Section 2 First because "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place". For similar reasons, in *BN v. BMWE* the Court refused to infer an enforceable obligation from the "general language" of Section 2 First. 481 U.S. at 450. As the Court noted in *BN v. BMWE* (*id.* at 451 n. 15), it was appropriate in *Chicago River* (362 U.S. at 338-339) to infer an enforceable duty not to strike over minor disputes from the express and unambiguous command of RLA Section 3 that such disputes must be arbitrated; but it was not appropriate to infer a prohibition against secondary picketing from the general language of Section 2 First that was neither express nor unambiguous with regard to such conduct. The same consequences of an expansive reading and application of the language of Section 2 First that concerned the Court in *CNW v. UTU*, and that led to rejection of the carriers' argument in *BN v. BMWE* are pertinent here.

Thus, it is clear that because of the general language of Section 2 First on which the Fifth Circuit has relied, the precedential effect of its decision cannot logically be limited to just this union and just this case. While the Carriers argue that the Fifth Circuit's holding will have limited application, expansion of Section 2 First beyond the duty to bargain in good faith will certainly mean that the provision will be applied to other situations. There simply is no principled way to confine the reasoning of the decision below so that it will not effect the sorts of cases that are described in BMWE's petition at 19-21; and that necessitates this Court's review of the Fifth Circuit's decision.

CONCLUSION

The Court should grant the writ sought by BMWE, and review and reverse the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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